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Susan B. Hazen, Director  
Environmental Assistance Division  
Office of Pollution Prevention and Toxics  
U.S. Environmental Protection Agency (7408)  
401 M Street, S.W.  
Washington, D.C. 20460

42187  
C/a - 051  
32 pp

Dear Ms. Hazen:

The American Automobile Manufacturers Association (AAMA) and the Association of International Automobile Manufacturers (AIAM) are submitting the attached comments on EPA's proposed test rule for hazardous air pollutants which was published in the *Federal Register* on June 26, 1996 at 61 FR 33178. AAMA is a non-profit organization whose members include the Chrysler Corporation, the Ford Motor Company, and General Motors Corporation. AIAM is the trade association representing the United States subsidiaries of international automobile companies doing business in the United States. Member companies distribute passenger cars, light trucks, and multipurpose passenger vehicles -- nearly half of which are manufactured in American plants established by AIAM companies in the past decade.<sup>1</sup> AAMA and AIAM members directly employ more than 760,000 people and produce cars and trucks in 389 facilities.

Even though "processors" are not required by EPA to submit letters of intent or exemption applications at this time, AAMA and AIAM believe this proposal demonstrates the problems associated with EPA's interpretation of the term "processor" as it applies to end users of chemicals. Our associations have raised this issue with the Agency numerous times over the past several years. We hope that the Agency will address our concerns over the "processor" issue in a comprehensive manner in the near future.

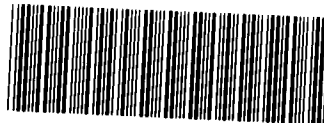
We would appreciate the opportunity to discuss the "processor" issue with you or your staff in the near future and will call you to arrange a mutually convenient time for a meeting.

Sincerely,

Julie C. Becker  
Senior Attorney  
AAMA

Amy M. Lilly  
Director of Manufacturing Operations  
AIAM

Attachments



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**Contains No CBI**

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AIAM Member companies include American Honda Motor Co., Inc., American Suzuki Motor Corporation, BMW of North America, Inc., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor of America, Inc., Mercedes-Benz of North America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls Royce Motor Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

**COMMENTS OF THE  
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION  
AND THE  
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.  
ON EPA'S PROPOSED TEST RULE  
FOR HAZARDOUS AIR POLLUTANTS**

**61 Fed. Reg. 33178 (June 26, 1996)  
(OPPTS-42187A; FRL4869-1)**

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**May 6, 1997**

**COMMENTS OF THE**  
**AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION**  
**AND THE**  
**ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.**  
  
**ON EPA'S PROPOSED TEST RULE**  
**FOR HAZARDOUS AIR POLLUTANTS**

**61 Fed. Reg. 33178 (June 26, 1996)**  
**(OPPTS-42187A; FRL4869-1)**

In the preamble to the proposed test rule for 21 hazardous air pollutants (HAPs), EPA states that its requirements apply to processors, but they "would not be required to submit letters of intent or exemption applications unless directed to do so in a subsequent notice as described in 40 CFR 790.48(b)." 61 Fed Reg 33189. The American Automobile Manufacturers Association (AAMA) and the Association of International Automobile Manufacturers (AIAM) appreciate EPA's efforts to exclude "processors" at this time. EPA's action regarding HAP's is consistent with representations that have been made to "processors" in the past. In an October 14, 1994 letter to counsel for these associations, the then-Director of the Office of Pollution Prevention and Toxics stated the following:

TSCA section 4 test rules. Currently, processors are covered by all section 4 test rules (see 40 CFR Part 790.42). However, processors need not submit letters of intent to test or exemption requests unless directed to do so in an FR notice issued subsequent to a final test rule. OPPT has not to date required processors to test chemicals under test rules. Nonetheless, under the current procedure, processors must comment on all test rules or lose the opportunity to do so. Additionally, processors remain responsible for potential testing until the requirements of the rule are satisfied. This period may last more than 10 years.

OPPT will commit to exclude processors from individual test rules where it is believed that manufacturers will complete the testing. If at any time before, during, or after the rulemaking process it was determined that no manufacturer

would or could complete the testing (e.g., if there were no manufacturers), then EPA could go through rulemaking to place the testing burden on the processors. (emphasis added)

Even though EPA has acted in accordance with its previous representations, issuance of the test rule again highlights the need for a distinction between “processors” and “end users”.

As end users of several of the listed chemicals, our members are considered “processors” under EPA’s expansive interpretation of this term, because EPA includes as “processors” chemical end users who “incorporate” chemicals into an article. Vehicle production involves the incorporation of literally thousands of substances into the vehicle or components of the vehicle, including many mixtures supplied by vendors. On several previous occasions since 1992, AAMA and AIAM have commented to EPA on the misapplication of EPA’s interpretation of the term “processor” to the operations of our members.<sup>1</sup> In each of these comments, AAMA and AIAM have demonstrated why it is not appropriate to consider end users of chemicals “processors”. This proposed test rule presents another opportunity to demonstrate why the use of chemicals by member companies should not subject them to any requirements under this proposed test rule.

It is clear to AAMA and AIAM that there are manufacturers for each of the listed chemicals, since the member companies purchase some of these chemicals directly from manufacturers or suppliers who purchase them from manufacturers. In other cases, our members purchase the listed chemicals as a part of a mixture (e.g., a coating) that is used in vehicle production. Obviously, there are manufacturers of these chemicals. The chemical manufacturers have always fulfilled their responsibilities under previous TSCA test rules, and EPA has not given any reason to believe they will in this case as well.

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<sup>1</sup>[Cite to August 1992 testimony, August 1993 comments, August 1994 letter to EPA, and November 1996 comments.] Attached are copies of the August 1992 statements to EPA on the processor issue.

AAMA and AIAM members do not process these chemicals. Rather, they use them at different points in vehicle/component manufacturing operations. This can best be demonstrated by examples of how some of the chemicals covered by this proposal are used in vehicle manufacturing operations.

- Ethylene Glycol - This is a common component of antifreeze that is added to a vehicle's cooling system at late stages of production. Antifreeze is purchased in bulk and the appropriate amount is transferred from a bulk container to each vehicle.
- Ethyl benzene - This is found in some windshield cleaning materials. The windshield cleaning material is also purchased in bulk and is transferred from a larger container to the reservoir in each vehicle. This material is also a trace substance found in some gasolines that are added to the vehicle fuel tank at the end of the assembly.
- Hydrochloric Acid - This is used in some manufacturing operations for pH adjustment to water used in the preparation of vehicle bodies for coating. A small amount of HCl is added to a large amount of water to obtain proper pH to prepare the body for electrostatic coating.
- Methyl Isobutyl Ketone, Methyl Methacrylate - These are components of coatings and/or adhesives used in the vehicle production process. They are mixed with other materials by a coating or adhesive manufacturer or supplier and sold to member companies as part of a coating or adhesive product used during production.
- Diethhanolamine - This is used as a cooling agent for engine machining operations. It is purchased from a manufacturer/supplier and is transferred from a larger container into the machine tools. A trace amount could be found on engine components that are incorporated into a vehicle.

As each of these examples demonstrate, the use of EPA's overly broad interpretation of the term "processor" to include incorporation into an article provides no basis upon which responsibility for testing should be established. One who simply transfers a substance from a large container to a smaller one, or who uses a product for its intended purpose has paid the manufacturer of the product a price which should reflect any required TSCA testing. To impose the testing burden on the user of the product would impose a double cost to end users and an additional burden with no apparent added benefit. This is especially true since the chemical manufacturers must otherwise perform the testing in any event.

As AAMA and AIAM have stated on repeated occasions, EPA's interpretation of the term "processor" to include end users of chemicals is inconsistent with the language of TSCA and its legislative history. In addition, this interpretation has been in the form of informal guidance documents which have not been subjected to full rulemaking procedures. These two points will not be addressed in detail in these comments, but they are articulated in the attached comments in other proceedings.

This test rule once again demonstrates the need to address the "processor" definition in a comprehensive manner. We renew our offer to work with EPA in an expeditious manner to address this issue so that both EPA and industry can devote their time and resources in a manner that actually promotes environmental protection and pollution prevention.

## Chemical "Processing" Under TSCA

**OPPTS**  
**Docket No. 00123**

**TESTIMONY OF GREGORY J. DANA  
VICE PRESIDENT AND TECHNICAL DIRECTOR OF  
THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS (AIAM)**

**September 22, 1992**

## I. INTRODUCTION

My name is Gregory J. Dana, I am vice president and technical director of the Association of International Automobile Manufacturers ("AIAM"). AIAM represents the interests of importers and manufacturers of automobiles, multi-purpose passenger vehicles and light-duty trucks.<sup>1/</sup> AIAM members manufacture vehicles in foreign countries for import into the United States, and manufacture vehicles in the United States for sale here, as well as for export.

I would first like to express my thanks to EPA for holding this public meeting and for the opportunity to testify. However, after reviewing the Background Document prepared for this meeting, I am concerned that EPA has engaged in "rulemaking by policy guidance" which has preempted the opportunity for any meaningful public input until now. The largely, indeed, almost wholly, non-public nature of the development of EPA's interpretation of the term "process" under the Toxic Substances Control Act ("TSCA") has resulted in what appears to be a needlessly broad application of this statute that has the potential to unduly burden many article producing companies and which would result in few, if any, health or environmental

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<sup>1/</sup> The members of AIAM currently are: American Honda Motor Co., Inc., American Isuzu Motors, Inc., American Suzuki Motor Corporation, BMW of North America, Inc., Fiat Auto U.S.A., Inc., Hyundai Motor American, Mazda Motor of America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motor Cars, Inc., Rover Group USA, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.



benefits. AIAM hopes that EPA will continue public discussion of this issue which will lead to a resolution of the problems caused by EPA's over-broad interpretation of this term.

I will first discuss EPA's current interpretation of the term "process". Second, I will review the ramifications of this interpretation. Third, I will discuss why neither TSCA nor its legislative history support EPA's interpretation or its ramifications. Last, I will recommend that EPA conduct a formal rulemaking on this issue and then provide some suggestions of possible solutions that should be considered in that context.

## II. EPA'S OVER-BROAD INTERPRETATION OF THE TERM "PROCESS"

With specific regard to AIAM's concerns, EPA has interpreted the term "processing" in ways which encompass many of the activities performed by importers and manufacturers of automobiles. Possibly EPA's broadest interpretation, set out in a question and answer ("Q&A") document, which was not published in the Federal Register, and as far as I have been able to ascertain was not subject to public comment, suggests that an "article producer" could be said to be "processing" the chemical substances that are "incorporated into" an article that is distributed in commerce. [EPA Background Document at 67, quoting Q&A document at example 20, March 1989.] The Q&A document repeats this interpretation using the example of painting a car with a spray nozzle which adds a solvent to the paint as it is released from the nozzle. In this example, the solvent

dissipates before the car is distributed in commerce so, the example states, this chemical is not "processed" for the purposes of TSCA. However, the chemicals applied to the car in the form of paint have been "processed" since they were incorporated into an article that was distributed in commerce. [Id. at example 26-27.] There are other similar examples, which involve many of the activities AIAM members routinely conduct at both port and manufacturing facilities, that are discussed in EPA's Background Document.

### **III. RAMIFICATIONS OF EPA'S OVER-BROAD INTERPRETATION**

EPA's expansive interpretation has vast ramifications. It means that many of the activities performed with regard to importing and manufacturing automobiles could be categorized as "processing" activities and consequently be subject to various sections of TSCA. Many of these activities are performed by importers at ports or at vehicle preparation centers. Such activities include: any touch-up painting or application/removal of protective coatings of vehicles such as may be necessary due to shipping; adding refrigerant to the air-conditioning units of vehicles; and even adding fluids to the engine could be considered "processing" under EPA's over-broad interpretation of the term. This list, obviously, is not inclusive. Indeed, EPA's interpretation is so expansive that, arguably, even the adding of accessories which are finished component parts such as hubcaps,

rear view mirrors, tires, etc, might be considered the "processing" of the chemicals in these parts.

In addition, AIAM members also have traditional vehicle manufacturing facilities in the U.S which use numerous chemicals in their operations. These operations include: manufacturing engines and drive trains; interior components; as well as complete manufacture of automobiles and light-duty trucks. Conceivably, under EPA's expansive interpretation of "processing", thousands of chemicals that are incorporated into a motor vehicle could be considered to be "processed" under TSCA.

It would be a Herculean, if not completely impossible task, for an importer or manufacturer of automobiles to keep track of, and to know, every chemical "processed" in every activity it performs. Since this is the task that may be necessary to ensure that a given company is in compliance with the law under EPA's current interpretation, EPA must narrow its interpretation to clarify what "processing" is and who "processors" are for the purposes of TSCA. This must be done because EPA's current interpretation is not supported by the law.

#### **IV. NEITHER TSCA NOR IT'S LEGISLATIVE HISTORY SUPPORTS EPA'S OVER-BROAD INTERPRETATION OR THE RAMIFICATIONS OF THIS INTERPRETATION**

Neither TSCA nor its legislative history support the expansive definition that EPA has chosen to give to the term "process". Section 3 of TSCA defines the term "process" as the

"preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce-

"(A) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or

"(B) as part of an article containing the chemical substance or mixture." [Id. (emphasis added.)]

Section 3 of TSCA also provides that the "term 'processor' means any person who processes a chemical substance or mixture."

The plain language of the statute confirms that Congress sought to regulate the chemical manufacturing, processing, and distributing industries through TSCA, not the industry that constitutes the "end users" of the chemicals produced. To quote the EPA, "[a] person becomes a processor by undertaking [the] 'preparation' step", and then distributing the chemical (in one form or another) in commerce. The producers of chemicals, not the industries that are the "end users" of them, prepare chemical substances or mixtures for distribution in commerce either as chemical substances or mixtures in and of themselves, or as "contained" in articles. In contrast, industries such as vehicle importing and manufacturing use chemicals for their end uses to produce finished articles. These articles (automobiles) are not vessels that "contain" individual chemical substances or mixtures.

TSCA's legislative history reinforces who Congress envisioned as "processors" and the types of concerns Congress intended to guard against by placing certain obligations on "processors" under TSCA.

It is clear that Congress, in enacting TSCA, sought to protect the public against exposure to harmful chemicals. An illustration of this goal is provided by a statement Senator Tunney made during Senate consideration of the Senate Bill:

"S.3149 will close major gaps in the law that leave the public inadequately protected against the unregulated introduction of hazardous chemicals into the environment. S.3149 will assure that chemicals will receive careful pre-market scrutiny before they are manufactured or distributed to the public."

[EPA Background Document at 5, quoting H.R. Rep. No. 689, 94th Cong. 2d Sess., (1976) at 91 (emphasis added).]

The concern expressed by Senator Tunney is crystal clear. The public should be protected against exposure to hazardous chemicals. The question is what industry sector is best equipped to shoulder the responsibility of fostering this protection. The House Committee Report reveals that Congress recognized that the chemical manufacturing, processing, and distributing industry was primarily responsible under TSCA. This recognition is stated in one instance where the Report distinguishes between mixtures and chemical substances.

The Report says:

"Although the term chemical substance excludes mixtures of chemical substances, mixtures are not excluded from regulation

under the bill. However, mixtures are regulated in a different manner than chemical substances - they are not subject to the manufacturing and processing notices for new chemical substances under section 5 and special findings are required before testing of them may be required or before they can be subject to rules under section 8(a) requiring recordkeeping and reporting for them."

[EPA Background Document at 6, quoting H.R. Rep. No. 1341, 94th Cong., 2d Sess. (1976), at 12 (emphasis added).]

The reason "mixtures" are regulated in a less stringent manner than "chemical substances" is because Congress recognized that the ultimate responsibility for a given "chemical substance's" presence in the marketplace is on the person who creates that substance, not on an "end user" of that substance. "Mixtures" are more representative of the form that "chemical substances" take after they have moved through industrial manufacturing toward incorporation into a finished article. "Mixtures" are regulated less stringently under TSCA than "chemical substances". Congress intended TSCA to focus on the upstream chemical manufacturers, processors and distributors, not the downstream end users that use the given chemical or mixture for its intended purpose. Indeed, if this were not the case, EPA would have the impossible administrative task of tracking nearly every industry -- even including such industries as residential home builders since constructing a home involves the incorporation of component parts into an "article". Thus, under EPA's over-broad interpretation, it could be argued that each of

the assembled parts of the final structure could be said to have been "processed" by the builder.

Clearly this was not Congress' intent. The discussion in the Report regarding "end user" versus "manufacturer" is illustrative. To quote:

"For example, there are certain substances or mixtures, such as adhesives, paints, inks, and drying oils, which during storage or upon end use, when exposed to environmental factors such as air, moisture, or sunlight, undergo a chemical reaction which produces a different substance or mixture. . . . In such cases, the chemical reaction is merely incidental to the end use or storage of the original substance or mixture. The substance or mixture produced is not used as a chemical substance or mixture, per se. It is not the Committee's intent that a person, such as a painter, who is engaged in the end use or storage activity in which such a chemical reaction occurs is to be considered a manufacturer because of the reaction. Thus, such a person would not be subject to the notification requirements of § 5 even though a chemical substances resulting from the reaction is not included in the inventory under § 8(b)."

[EPA Background Document at 7, quoting H.R. Rep. No. 1341, 94th Cong., 2d Sess. (1976), at 13 (emphasis added).]

The distinction made between "end user" and "manufacturer" illustrates that Congress recognized that "end users" are not primarily responsible for the placement of the chemical substances in question in the marketplace and, for this reason, should not be regulated as stringently as those who are responsible. Since "manufacturer" and "processor" are almost inseparably regulated as one and the same under TSCA, the

distinction made in the Report could be said to apply to processors as well.

Congress recognized that implicating "end users" would create an administrative nightmare that would not yield any positive results. Indeed, the Conference Report discussion regarding Section 8 of TSCA clearly makes this point. In discussing the kinds of activities for which recordkeeping and reporting may be required under Section 8, the Conference Report states that "the manufacturer or processor must provide information of which a reasonable person similarly situated might be expected to have knowledge." [EPA Background Document at 3, quoting H.R. Rep. No. 1679, 74th Cong., 2d Sess. (1976), at 80 (emphasis added).] This language is also used in section 8 of TSCA. It is unrealistic to assume that an importer of automobiles, as a reasonable person, would have knowledge of the chemical composition of every component part of an automobile that it may be "processing" under EPA's expansive definition of the term. Literally thousands of substances are "incorporated" into automobiles by importers and manufacturers of those vehicles.

It is impossible to argue that a reasonable person similarly situated would have knowledge of what each one of these substances is, nor would another reasonable person expect it. Indeed, typically the most that an importer or manufacturer knows about the chemical composition of the materials it purchases is stated in the Material Safety Data Sheet ("MSDS") provided by the



vendor of the material. In addition, the MSDS usually does not include all the chemicals that make up the mixture since information on low concentration chemicals is not required. Finally, it would be literally impossible for an automobile importer or manufacturer to know each and every chemical that may be included in the thousands of component parts of an automobile down to trace amounts.

Congress intended that the chemical manufacturing, processing, and supplying industries, since they have, or should have, knowledge of the composition, the intended use, and the reactive qualities of the chemicals they produce or distribute, to bear the primary responsibility under TSCA. It is these entities that, as a reasonable 'persons', have the most comprehensive knowledge of the chemicals they manufacture, process or distribute. They know that the chemicals they disseminate are for particular intended uses. Persons who use the chemicals distributed for the respective chemical's intended purpose and who follow the manufacturer's, processor's, or supplier's instructions for use should not be burdened with responsibilities rightfully placed on those who first place the chemical in question into commerce.

#### **V. NEXT STEPS AND POSSIBLE SOLUTIONS**

AIAM strongly recommends that EPA conduct a formal rulemaking to limit its interpretation of the term "process". With an eye toward this formal rulemaking and, in the interest of

clarifying AIAM's place in TSCA's framework so that its members may determine their regulatory obligations, I would like to make some general suggestions as to how EPA might clarify how the term "processor" relates to an "article producer."

EPA could create a definition of "article producer." This definition would clearly state that "article producers" are not processors for the purposes of TSCA. The term "article producer" should be defined as end users of chemicals that are used for their respective intended use and are incorporated into an article that does not present any direct exposure risks to the ultimate consumer of the article or to the environment. As such, "article producers" would not be "processors" unless a given regulation specifically provided that "article producers" in addition to "processors" are covered. Such a definition would allow "article producers" to determine their regulatory obligations.

Another possible solution would be for EPA, through rulemaking, to presumptively exclude "article producing" industries, such as the automobile importing and manufacturing industries, from Section 4 and Section 8 requirements, unless EPA specifically identifies these industries in the ANPRM or NPRM.

A third possible solution would be for EPA to establish a de minimis exclusion for "processing" amounts of chemicals which are less than OSHA threshold levels.

## VI. CONCLUSION

AIAM would again like to thank EPA for the opportunity to publicly present our views. Further, AIAM hopes that the suggestions it has made today help EPA to develop a workable interpretation of the term "process" under TSCA. Finally, AIAM looks forward to future public discussion of, and resolution of the problems generated by, the application of the term "processor" as it is currently interpreted by EPA.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

Chemical Processing Under The  
Toxic Substances Control Act

OPPTS  
Docket No. 00123

TESTIMONY OF DAVID J. HAYES  
ON BEHALF OF  
THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION  
OF THE UNITED STATES, INC.

September 22, 1992

Good morning. My name is David J. Hayes. I am appearing this morning on behalf of the Motor Vehicle Manufacturers Association of the United States, Inc. I am a partner with Latham & Watkins, and am Toxic Substances Control Act (TSCA) counsel for MVMA.

## INTRODUCTION

MVMA commends the Environmental Protection Agency (EPA or Agency) for calling this public meeting and for inviting public comment on the scope of "processing" activities under the Toxic Substances Control Act. MVMA and its member companies are extremely interested in this issue. Our interest is rooted in our members' commitment to compliance with applicable environmental laws, and our coextensive commitment to assisting the Agency in developing regulations that implement the environmental laws in a rational, workable, and effective manner.

MVMA is particularly interested in the current proceeding because the Association and its members have identified the definition of a "processor" under TSCA as the single most important generic TSCA issue that faces MVMA members. The "processing" issue is of paramount interest to MVMA because motor vehicle manufacturers typically are not engaged in the "manufacture" of chemicals. Instead, they engage in the end use of chemicals that are supplied by chemical manufacturers and chemical formulators. These end uses include metal cleaning and finishing, painting, and other applications in the automotive assembly component manufacture and other related processes.

Although MVMA members typically utilize chemicals for end use purposes, EPA has issued a variety of interpretations of the definition of "processor" under TSCA which would reclassify end uses of chemicals and treat them as though they involve the "processing" of chemical substances. MVMA objects to these interpretations for three principal reasons.

First, as a matter of statutory construction, EPA's expansive approach to the concept of "processing" would read out of TSCA virtually any distinction between the "processing" and "use" of a chemical substance. Neither the language of the statute nor its legislative history can support such an interpretation. As I will describe more fully in this testimony, Congress specifically intended to regulate the activities of chemical manufacturers and processors because both manufacturers and processors are engaged in "upstream," pre-distribution activities -- namely, the preparation of chemical substances for distribution in commerce. Because manufacturers and processors prepare chemicals for distribution and sale before the chemicals enter the marketplace, and because the TSCA structure focuses on the regulation of chemicals before they enter the stream of commerce, the language and history of TSCA establish a sharp distinction between manufacturers and processors of chemical substances on the one hand, and end users of chemicals on the other hand. By seeking to define processing in an overly-inclusive manner, however, EPA has blurred this important distinction.

Second, in addition to objecting to the scope of EPA's view of "processing," MVMA also objects to the patchwork approach that the Agency has taken in defining the term. As the Agency's own compilation of processing interpretations illustrates, EPA has developed a disjointed, section-by-section approach to defining the scope of

"processing" activity. In addition, many of the Agency's interpretations have been issued in an informal manner that has not involved notice to, or the participation of, the chemical user community.

Third, many aspects of EPA's expansive approach to defining chemical "processing" activities are simply unworkable. As an illustration of this point, MVMA's testimony will analyze the practical implications of EPA's position that the "incorporation" of any chemical substance into an "article" involves the "processing" of each and every such chemical substance that becomes associated with the article. Strict application of this concept to the automotive industry would create enormous regulatory burdens and present a virtually insurmountable compliance challenge. In addition, these burdens would not be accompanied by any regulatory "payback" or environmental or public health benefit. Instead, they would dilute the Agency's ability to meaningfully collect and analyze data related to core "processing" activities. This is not what either Congress or EPA intended; MVMA requests that the problem be addressed, and remedied.

Having provided this overview, I will now address each of these three central issues in more detail:

I. TSCA'S LANGUAGE AND HISTORY SUPPORT THE VIEW THAT CHEMICAL USERS DO NOT QUALIFY AS CHEMICAL "PROCESSORS"

The definition of "process" under Section 3 of the Toxic Substances Control Act defines processing as "the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce." By its terms, these clear words confirm that "processing" is not intended to apply to end uses of chemicals. Instead, "processing"

encompasses chemical-related activities that involve the further distribution of chemical substances in commerce. Examples specifically referenced in the definition include the preparation of chemical substances in different forms for distribution in commerce, and the addition of chemical substances into articles that "contain" the chemical substances.

This straightforward description of processing activities precisely tracks the activities of chemical formulators -- the companies that Congress had in mind when it references "processing" activities under the statute. More specifically, chemical formulators take chemical substances that have been manufactured by other companies and they prepare such substances for further sale and distribution in commerce. To illustrate, chemical formulators prepare specific combinations of chemicals for sale as products that provide special performance characteristics. Likewise, some companies involved in chemical processing activities place chemicals in articles that are being manufactured for distribution and sale in commerce, as in the addition of ink in pens, acid in batteries, mineral oil in transformers, and the like.

These activities, which are directly referenced in the language of TSCA, accurately describe the preparatory activities of companies that manufacture and process chemicals for downstream applications. They do not describe, however, the activities of chemical users. Unlike chemical formulators, for example, chemical users are not interested in preparing chemical substances or mixtures for direct distribution and sale in commerce as chemical substances, or for indirect distribution or sale in commerce by being "contained in" articles. Instead, chemical users are interested in using chemicals for their own sake in connection with the manufacture of non-chemical products.



The legislative history of TSCA, while limited, provides support for this plain reading of the statute. Specifically, the legislative history characterizes both chemical "manufacturing" and "processing" as activities that precede the distribution of chemical substances in the general stream of commerce. For example, the legislative history refers jointly to manufacturing and processing because both activities involve the preparation of chemicals before they are distributed in commerce. As the legislative history makes clear, Congress was particularly interested in this distinction between "upstream" chemical activities (viz., manufacturing and processing) and downstream, end use activities because of Congress' overriding concern that "appropriate action [should be] taken before chemical substances are first manufactured and introduced into the marketplace." See generally EPA Background Document at 5-6.

The legislative history reconfirms this point by noting that end uses of chemicals should not be confused with manufacturing or processing activities, even when customary end uses trigger chemical reactions that might, as a technical matter, otherwise qualify as the "manufacture" of a chemical substance. The House Report, for example, commented that a painter's application of paint to a surface qualifies as the "end use" of a chemical substance; the occurrence of a chemical reaction on the painted surface does not convert the painting process into a chemical "manufacturing" activity. Id. at 7.

The clear contrast in the language and history of TSCA's definition of "processing" between pre-distribution manufacturing and processing/formulation activities on the one hand, and the end use application of chemicals on the other hand, provides strong evidence that automotive companies, which rely on chemicals that have been manufactured and/or formulated by suppliers for use in the motor vehicle assembly

process, qualify as end users of chemicals, rather than as "processors" of chemicals. Simply put, automotive companies are not in the business of "preparing" chemical substances for distribution in commerce -- whether through the manufacture or "processing" of such chemical substances. Instead, they are in the business of manufacturing automobiles and trucks. Chemicals provide a means to that end, and are not the end itself.

In the years since TSCA's passage, EPA has strayed farther and farther from the statutory distinction between chemical manufacturers and processors that are involved in pre-distribution, "preparation" activities, and chemical users that are involved in post-distribution, downstream uses of chemicals. As discussed in the next portion of my testimony, the Agency's blurring of the distinction has occurred gradually, in a manner that presents chemical users, including MVMA members, with a confusing patchwork of regulatory history -- a patchwork that departs, in MVMA's view, from the language and history of the statute, and a patchwork that presents serious compliance challenges for vehicle manufacturers and other members of the chemical user community.

## II. MVMA OBJECTS TO EPA'S INFORMAL, PATCHWORK APPROACH TO DEFINING THE SCOPE OF ACTIVITIES THAT ALLEGEDLY QUALIFY AS "PROCESSING" UNDER TSCA

Despite the central importance of defining those activities that qualify as "processing" under TSCA, EPA has provided little guidance regarding the scope of the term in its implementing regulations. For example, the definition of "process" which is set forth in the premanufacture notice (PMN) regulations has been taken, word for word and without elaboration, from the statutory definition. See 40 C.F.R. 710.2. More

recently, in the context of the Comprehensive Assessment Information Rule (CAIR), EPA has adopted a more descriptive definition of "processing activities," but the definition continues to preserve the statutory distinction between the "preparation" of chemical substances for distribution and sale, and the downstream use of chemical substances. See 40 C.F.R. 704.204.

Behind its official rulemakings, however, EPA has offered a wide variety of explanations regarding the scope of the "processing" activities. These explanations present a much different, and a much more expansive, notion of the types of activities that qualify as "processing" under TSCA. For example, in the context of informal guidance documents and "Question and Answer" compilations, EPA has converted the statute's statement that "processing" includes the addition of chemicals to an article which "contains" chemical substances into the much more expansive notion that "processing" occurs whenever any chemical substance is "incorporated into" an article. In so doing, the Agency has managed to completely confuse chemical preparation/processing activities with the end use of chemicals, and it has done so in the context of informal interpretations that do not have the benefit of public review and comment.

MVMA's concerns with the informal nature of much of EPA's regulatory history on this issue are compounded by the Agency's scattered approach to defining the scope of the term. Rather than promulgating a single, well-reasoned and well-documented interpretation of the term, the Agency has fashioned a variety of permutations of "processing" that require an extraordinary effort to piece together. The long period taken by the Agency to prepare the Background Document issued in connection with this hearing illustrates the point.

Because the definition of processing presents a threshold "jurisdictional" issue for many of TSCA's operative provisions, MVMA strongly objects to the Agency's informal, piecemeal approach to the issue. No member of the public should be held accountable to an informal interpretation of "processing" that is generated in the context of a guidance document under Section 8(a) or Section 8(d). In MVMA's view, the fundamental concepts of processing should be clearly set forth in the context of a single, formal rulemaking that applies across the statute. Once defined and limited, it may be appropriate for the Agency to exempt certain types of processing activities for specific purposes, but until processing is more precisely defined as a general matter, case-by-case exclusions will only muddy the waters further.

### III. SOME ASPECTS OF EPA'S LATEST FORMULATIONS OF "PROCESSING" ACTIVITIES ARE SIMPLY UNWORKABLE

As explained above, EPA has released informal guidance which suggests that whenever a chemical substance is "incorporated into" an "article," that chemical substance is being "processed" by the "article producer." See, e.g., March 1989 Q&A document. In two simplistic case examples, EPA's unpublished Q&A document drew a distinction between a chemical substance which is part of an automotive painting operation, but which does not become affixed to an "article" (i.e., a car), and another chemical substance that "remains as a component" in the finished product. In the first case, EPA concluded that the "article producer" concept does not apply and the substance is not "processed"; in the second case, the Q&A document concluded that the substance should be considered "processed" because the chemical substance, or some residue thereof, has become "a component of" the motor vehicle. See March 1989 Q&A

at Questions 26-27.

The practical effect of such a broad interpretation would be equivalent to regulating as "processing" the production of every kind of article. Under EPA's view, almost every article imaginable has some chemical substance incorporated into it. Resins are incorporated into plywood; alloys are incorporated into metals and many hundreds of chemical substances are incorporated into complex articles such as appliances, aircraft, and automobiles. Even though TSCA generally excludes articles from regulation and, in so doing, recognizes the distinction between articles and chemical substances or mixtures, EPA's approach would regulate article production as though it were essentially identical to the production of chemical substances or mixtures.

As discussed in this testimony, MVMA objects to this interpretation of "processing" on both substantive and procedural grounds -- the definition represents a significant departure from the language and history of the statute, and it has been articulated in informal guidance documents, rather than subjected to notice-and-comment rulemaking procedures.

Perhaps because of its questionable origins, it should not be surprising that strict application of this definitional approach to "processing" presents serious workability concerns when it is applied to the non-chemical context of vehicle manufacturing activities. First, a great number of chemicals and their components (in the case of mixtures) arguably are "incorporated" through various automotive-related manufacturing processes into the finished product -- an automobile. Unlike the manufacture of a chemical substance or mixture, which typically involves the processing of a limited universe of well-defined and more easily-tracked chemical substances, automotive

manufacturing involves a large number of separate manufacturing-related operations, which together may involve the "incorporation" of literally thousands of substances into cars and trucks.

To illustrate, many discrete steps involved in the production of motor vehicles, and in other non-chemical manufacturing operations, may involve the "incorporation" of chemical substances into a final product. Painting motor vehicles, metal furniture, aircraft, and new homes all may involve the "incorporation" of certain chemical substances in a finished product. The manufacture and installation of various automotive components, including such diverse items as engines, brakes, instrument panel assemblies, foam seating, etc., or the manufacture of furniture, computers, or other equipment, likewise may involve some "incorporation" of certain chemical substances into a final product.

In all of these examples, however, the role played by such substances in manufacturing non-chemical "articles" contrasts sharply with the role that the substances play in chemical manufacturing. In chemical manufacturing activities, chemical substances are of central importance to the finished product -- they typically are the finished product -- and the nature and scope of the chemical substances "incorporated into" the finished product are therefore well-known, well-defined, and of key importance.

In contrast, the "incorporation" of chemicals or their components (in the case of mixtures) into an automobile or another article is much less well-defined, and often is not readily-identifiable. The nature of the specific chemical substances that become bonded to motor vehicle bodies through the assembly process, for example, often cannot be specified with any precision. Similarly, the components and sub-components

included in paints that are applied to vehicles, and which become "incorporated" in the final finish, may include dozens, if not hundreds, of specific chemical substances.

To illustrate, MVMA members estimate that thousands of chemical substances and their components may become "incorporated into" a motor vehicle through assembly and painting operations. The specific identity of all of these chemical substances may not be known by automotive manufacturers. Indeed, the chemicals utilized by MVMA members typically are mixtures that are supplied by outside vendors. Automobile manufacturers typically have no more knowledge about the identity of chemical substances included in the mixtures than what is supplied by their vendors on Material Safety Data Sheets.

In addition, because many formulations include proprietary components, automotive manufacturers may be unable to track specific chemical substances that become affixed to motor vehicles. The absence of any de minimis thresholds in EPA's description of the "article processor" concept adds to the impracticality of attempting to track every individual subcomponent of every mixture or other chemical substance that becomes part of an automobile through application to the surface (e.g., paint), the interior (e.g., chemicals used to make and/or protect upholstery), and/or the mechanical components of the automobile (e.g., brakes, engines).

In conclusion, when the "article producer" concept is transferred from chemical manufacturing operations to the much different world of automotive manufacturing, the approach quickly becomes unworkable. The notion that a vehicle manufacturer which uses chemical mixtures supplied by vendors, would automatically qualify as a "processor" of every component of every mixture that is applied to or

otherwise becomes incorporated into an automobile, regardless of the quantity or type of chemical involved, and regardless of the specific manner in which such chemical substances are used by the manufacturer, would completely undercut the important distinction between the "processing" and "use" of chemicals.

In summary, application of the "article producer" approach of "processing" to automotive manufacturing activities would convert virtually all end-use applications of chemicals in the automotive industry into "processing" activities. Vehicle manufacturers would be treated as though they were chemical formulators. The regulatory burdens associated with such a classification would be severe. In addition, these severe regulatory burdens would not be accompanied by any regulatory "payback" or environmental or public health benefit. The classification of virtually all end-use applications of chemicals in the automotive industry as "processing" activities would significantly dilute the Agency's ability to meaningfully collect and analyze data related to core "processing" activities undertaken by chemical formulators.

## CONCLUSION

For all of the reasons discussed above, MVMA strongly recommends that EPA initiate a formal rulemaking to define "processing" activities under TSCA in a manner that more closely tracks the statutory language and history, that does so in the context of a formal rulemaking proceeding which applies across the statute, that takes into account practical considerations presented by downstream chemical users, and which distinguishes chemical processing from chemical use. MVMA stands ready to assist the Agency as it moves forward with this important endeavor.